UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California,	)	
Complainants	)	Docket No. EL00-111-002
v.	)	
California Independent System Operator Corporation,	)	
Respondent	)	
Salt River Project Agricultural Improvement and Power District	)	
Complainant	)	Docket No. EL01-84-000
v.	)	(Not Consolidated)
California Independent System Operator Corporation	)	

Reply Comments Of The California Independent System Operator Corporation and Opposition To Motions To Intervene Out-Of-Time

Pursuant to Rule 602(f) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure,[1] the California Independent System Operator Corporation ("ISO") hereby respectfully submits these Reply Comments in support of the Offer of Settlement and Settlement Agreement ("Settlement Agreement") filed on July 31, 2002 in the above-referenced proceedings. As detailed *infra,* none of the comments in opposition to the Settlement Agreement have merit and therefore all should be rejected in their entirety. Moreover, as explained *infra*, the ISO opposes the Motions to Intervene Out-Of-Time filed by

[1] 18 C.F.R. § 385.602(f) (2001)

IDACORP Energy, L.P. ("IDACORP"), Puget Sound Energy, Inc. ("Puget"), Enron Power Marketing, Inc. ("Enron") and the California Generators.[2] Permitting such interventions in a proceeding that has been underway for approximately two years and that has been the subject of publicly noticed settlement negotiations for almost a full year is fundamentally unfair to the parties who have participated in the settlement proceeding and also is contrary to the Commission's policy of encouraging settlements.

I. Background

The Settlement Agreement sets forth in detail the lengthy history of the proceedings in the above-referenced dockets and is the best resource to review for a full understanding of the history and issues raised herein. Suffice it to note that the proceedings have been underway for approximately two years, with the first of the two underlying complaints filed with the Commission, by the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California ("Southern Cities"), on September 15, 2000, in Docket No. EL00-111, and the second complaint submitted by the Salt River Project Agricultural Improvement and Power District ("SRP") on June 1, 2001, in Docket No. EL01-84. As detailed in the Settlement Agreement, the Commission has issued a series of orders in this proceeding, including a July 6, 2001, Order Initiating Settlement Proceedings and an

[2] The California Generators identify themselves as: Duke Energy North American, LLC; Duke Energy Trading and Marketing, L.L.C.; Dynegy Power Marketing, Inc.; El Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; Mirant Americas Energy Marketing, LP; Mirant California, LLC; Reliant Energy Power Generation, Inc.; Reliant Energy Services, Inc.; and Williams Energy Marketing & Trading Company.

appointment on July 11, 2001, of Judge Leventhal to serve as a settlement facilitator.[3]

The year-long settlement proceedings included settlement conferences on July 18, October 2, and November 1, 2001, and February 14 and March 19, 2002. These settlement conferences were noticed to the public and attended by Commission Staff and other active parties to the proceedings. Ultimately, the Settling Parties were able to reach a mutually acceptable resolution of the complaints filed by the Southern Cities and SRP that takes into consideration the interests of other parties and applies the relief accorded in this Settlement Agreement to all Scheduling Coordinators on a non-discriminatory basis. The Settlement Agreement was filed with the Commission on July 31, 2002.

Under Commission rules, comments are due within 20 days of the filing of the Settlement Agreement, and reply comments within ten days of the comment deadline. Thus the instant reply comments are timely. Moreover, answers to motions are due with 15 days, and therefore the answers to motions to intervene out-of-time are timely as well.

II. All Motions To Intervene Out-Of-Time Will Delay And Prejudice The Proceeding And Should Be Denied In The Interests Of Fairness

The Commission's Rules of Practice and Procedure, 18 CFR §385.214, set forth the requirements a movant must meet to intervene in a Commission proceeding. Specifically, in considering a motion to intervene out-of-time, the Commission will consider, among other factors: 1) whether the movant had a

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[3] *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. California Independent System Operator Corporation*, 96 FERC ¶ 61,024 (2001); Order of Chief Judge Designating Settlement Judge and Scheduling Settlement Conference, Docket Nos. EL00-111-002 and EL01-84-000 (issued July 11, 2001).

good cause for failing to file the motion to intervene within the time proscribed; 2) whether any disruption of the proceeding might result from permitting intervention; and 3) whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention. As explained *infra*, consideration of these factors mandates rejection of all motions to intervene out-of-time.

Simply stated, having ignored these proceedings for nearly two years, IDACORP, Enron, Puget and the California Generators now seek to intervene out-of-time. IDACORP, Enron and Puget oppose the Settlement Agreement while the California Generators do not comment at all.[4]

Critically, none of the entities seeking late intervention has demonstrated a good cause for its failure to seek timely intervention at the appropriate early stages of these proceedings. Indeed, the first of the two unconsolidated proceedings was initiated in Docket No. EL00-111-000 on September 15, 2002, almost two years ago. Although other parties submitted timely motions to intervene, IDACORP, Enron, Puget and the California Generators did not. Moreover, the Commission issued two published orders in this docket, on March 14 and May 14, 2001. Both Southern Cities and the ISO filed petitions for review of these two orders, but again, neither IDACORP, Enron, Puget nor the California Generators requested permission to intervene in the review proceedings. The second complaint was filed by SRP in Docket No.EL01-84-000 on June 1, 2001,

[4] Thus, in addition to the reasons for denying all motions for intervention out-of-time, the California Generators' motion must be denied because that particular motion fails to comply with Section 385.214(b), which provides that any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

more than one year ago. Again, none of the entities now seeking intervention requested permission to intervene at that time.

The Commission issued its "Order Initiating Settlement Proceedings"[5] on July 6, 2001. Subsequently, six settlement conferences were held before the assigned Settlement Judge, Judge Leventhal, commencing on July 18, 2001 and concluding on May 16, 2002. Each of these settlement conferences was noticed to the public and attended by Commission staff and active parties to the proceedings. Having rested on the sidelines for almost two years, it is unreasonable, unfair and prejudicial to the parties to permit IDACORP, Enron, Puget and the California Generators to intervene at literally the eleventh hour, and moreover, in the case of IDACORP, Enron and Puget, to oppose the Settlement Agreement after they elected to ignore the settlement discussions for more than one year.

The California Generators claim that they could not have known that the Commission's March 14 and May 14 Orders might be subject to settlement proceedings. This is simply not credible because, promptly following the issuance of these two orders, petitions for review were filed by Southern Cities and the ISO. The California Generators, in the same way that they were aware of the two Commission orders, also should have been aware of the two petitions for review. Moreover, the Commission's July 6, 2001 "Order Initiating Settlement Proceedings" issued in both Docket Nos. EL00-111-000 EL01-84-000, further informed the public and entities interested in the March 14 and May 14, 2002 Orders that the issues addressed in those orders were to be the subject of

[5] 96 FERC ¶61,024 (2001).

settlement proceedings. It is unreasonable to expect that settlement proceedings would not potentially result in a compromise that would modify, to some extent at least, the underlying order(s) that gave rise to the settlement negotiations. Thus, the California Generators cannot now credibly argue that their alleged ignorance of Commission orders, or their surprise that settlement proceedings actually resulted in an offer of settlement, entitles them to a disruptive and prejudicial intervention out-of-time.

Indeed, consideration of the disruptive effect in the proceedings and the prejudice to other parties absolutely compels rejection of the motions to intervene out-of-time. If the entities seeking late intervention are permitted to intervene now and oppose the Settlement Agreement, it will effectively make the significant efforts of active parties, Commission staff and the Settlement Judge over the past year a waste of time. Permitting these entities to intervene at this very late stage in a two-year long proceeding would be unfair and prejudicial to all the parties that participated to date. Simply stated, the would-be interveners ignored notice after notice while the active parties worked to achieve a reasonable conclusion to these long-standing proceedings.[6]

It is particularly important that the Commission safeguard the credibility of the settlement process. If entities that assert an interest in a given proceeding elect to not participate in such a proceeding in a timely manner, such entities

[6] Although the ISO believes that Pacific Gas and Electric Company's ("PG&E") opposition to the Settlement Agreement, as detailed herein, lacks foundation, at least PG&E participated in the Commission's process.

should not be permitted to come in at the eleventh hour and seek to upset a settlement proposal that the active parties, Commission Staff and the Settlement Judge expended considerable time and effort to develop. Should the Commission permit such a negative result, the Commission's policy of encouraging settlements will be undermined.

III. All Comments In Opposition To The Settlement Agreement Fail To Identify Any Genuine Issue Of Fact Or To Otherwise Justify Rejection of the Settlement Agreement

Only one party to these proceedings, PG&E, opposes the Settlement Agreement. As discussed *supra*, the late-filed motions to intervene of the other entities that have also submitted comments in opposition to the Settlement Agreement should be rejected and their respective comments in opposition disregarded. The ISO will, however, respond herein to all comments opposing the Settlement Agreement.

Despite opposition comments alleging there are genuine issues of material fact that preclude approval of the settlement, no opposition party identified any such factual issue. Indeed, the comments in opposition instead focus upon legal, regulatory or policy issues, or, in many instances, merely proffer grossly misleading and inaccurate characterizations of the Settlement Agreement. In the following sections the ISO will reply to allegations that the Settlement Agreement would result in discrimination against non-settling parties, cost-shifting, or retroactive ratemaking.

A. The Settlement Agreement Will Result In Identical Application Of the Amendment No. 33 Calculation Methodology To Market Participants Without Distinction Between Settling And Non-Settling Parties

Contrary to allegations that non-settling parties will receive some sort of discriminatory treatment under the Settlement Agreement,[7] the Settlement Agreement expressly provides for consistent treatment of all similarly situated Scheduling Coordinators. It is completely incorrect for PG&E and Enron to claim that the Settlement Agreement will provide for re-runs and relief only to the settling parties. *See* PG&E Comments at 8, Enron Comments at 2-3. A simple reading of the express provisions at Section 2.2 of the Settlement Agreement shows that the Amendment No. 33 cost allocation methodology "shall be applied to each and every Scheduling Coordinator effective as of December 8, 2000." Moreover, Section 5.2 of the Settlement Agreement provides that "all Settling Parties, by and through their respective Scheduling Coordinators . . . shall be treated no differently that the ISO treats other Scheduling Coordinators" for purposes of the invoicing process to implement the settlement. Simply stated, all Scheduling Coordinators that acquired energy sufficient to meet their loads, during the settlement period of December 8 – 11, 2000, will be entitled to refunds or credits pursuant to the Settlement Agreement, and all Scheduling Coordinators that failed during that same period to procure sufficient energy to meet their load will be subject to the charges that the ISO incurred in purchasing energy to serve that part of the load such Scheduling Coordinators failed to meet.

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[7] *See* PG&E Comments at 8, 21 and 22; Puget Comments at 6; and Enron Comments at 2-3.

There is absolutely nothing discriminatory under basic cost-causation principles as endorsed and approved by the Commission, in charging the under-scheduling Scheduling Coordinators for the costs the ISO incurred in buying energy on their behalf.

Puget would have the Commission find the active parties are somehow engaged in discrimination by virtue of the settlement negotiations that have resulted in a Settlement Agreement that establishes terms upon which the Settling Parties agree to relinquish their claims and terminate the litigation. The very nature of a settlement proceeding is that the participating parties seek to craft a compromise consisting of terms and conditions mutually acceptable to all. As detailed *supra,* there is no reason whatsoever that Puget, or any other party for that matter, could not have intervened in a timely manner and participated in the settlement proceeding. Instead of resting on the sidelines, Puget could have played an active role in identifying the terms and conditions of the Settlement Agreement. It chose not to do so, and in that respect, Puget and the other would-be late interveners are not situated similarly to the active parties. The Settling Parties committed the time and effort to develop a settlement and, as is customary and common, the settlement is conditioned upon mutually negotiated provisions. There is nothing discriminatory, for example, in providing for conditions in the Settlement Agreement that permit the Settling Parties to consider whether conditions subsequent have undermined the intent of the settlement.

Moreover, as detailed *supra*, all Scheduling Coordinators will be treated equally under the terms of the Settlement Agreement. Thus, at the end of the day, Puget and other would-be late interveners, along with all other Scheduling Coordinators active in the ISO markets during the settlement period, will stand on an equal footing with the Settling Parties for application of the Settlement Agreement to the December 8 – 11, 2000 period.

B. The Settlement Agreement Adheres To the Commission's Principles of Cost-Causation and Cost-Allocation

The Settlement Agreement, through application of the Amendment No. 33 neutrality charge calculation, prescribes a means to more specifically assign costs for procurement of energy needed to meet load to those Scheduling Coordinators that failed to procure adequate energy to serve their loads. Thus, there is no basis in fact or principle for PG&E's unfounded assertions that the Settlement Agreement will somehow shift costs to PG&E. *See, e.g.,* PG&E Comments at 10-12 and 22-23. PG&E complains, for example, that it was a victim of market power and price manipulation and therefore "forced" to rely upon the ISO to serve its load. Be that as it may, the Commission has other proceedings underway to address market power and potentially unjust and unreasonable rates charged by suppliers in the ISO markets. *See, e.g.,* Docket No. EL00-95-045, *et.al.* The instant proceedings and the Settlement Agreement are not the proper venue for addressing such an issue: indeed, the Settlement Agreement merely proposes a method for allocating the costs of energy purchases by the ISO to meet the loads of PG&E and other Scheduling Coordinators that, for whatever reasons, good, bad or indifferent, failed to procure generation sufficient to serve their loads.

Notably, PG&E's Comments in opposition do not, because PG&E cannot, challenge the bare fact that the ISO bought energy to serve PG&E's load because PG&E failed to acquire enough energy on its own. Moreover, PG&E's Comments do not argue that the method for allocating the costs of such energy purchases by the ISO, prior to application of the Amendment No. 33 methodology, resulted in allocation of a large portion of such costs to Scheduling Coordinators who were not responsible for the purchases (*i.e.,* to Scheduling Coordinators who responsibly scheduled enough energy to meet their loads and who engaged in relatively little or no negative deviations from their schedules). PG&E does not explain why other Scheduling Coordinators should pay for the energy purchased by the ISO to serve PG&E's loads.

Given the fundamental principles of fairness embodied in the Commission's cost-causation and cost-allocation guidelines, PG&E should pay for the energy that the ISO had to buy to serve PG&E's loads. Accordingly, PG&E's Comments fail to justify rejection of the Settlement Agreement.

C. The Settlement Agreement Does Not Propose Retroactive Ratemaking

PG&E contends that the Settlement Agreement would implement an improper and illegal retroactive ratemaking. PG&E Comments at 2,9, and 22. This is not true. The September 15, 2000, complaint in Docket No.EL00-111, among other things, requested the Commission to require the ISO to allocate the costs of energy purchases to serve under-scheduled load to those Scheduling Coordinators that failed to schedule adequate resources. The Amendment No. 33 methodology provides for the requested relief in the September 15, 2000, complaint. The September 15, 2000, complaint, therefore, would support an

effective date for the Amendment 33 allocation methodology as early as November 14, 2000. Thus, implementation of the allocation methods proposed in the Settlement Agreement, being proposed for the period of December 8-11, 2000, and thus, after the November 14, 2000, effective date, does not constitute retroactive ratemaking.

IV. Conclusion

Wherefore, for the foregoing reasons, the ISO respectfully urges the Commission to approve the Settlement Agreement expeditiously, without modification or condition, to resolve these proceedings in accordance with the Commission's policy to encourage and facilitate settlements.

Respectfully submitted,

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Dated: August 30, 2002

CALIFORNIA ISO

California Independent
System Operator

August 30, 2002

The Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. California Independent System Operator Corporation, Docket No. EL00-111-002; Salt River Project Agricultural Improvement and Power District v. California Independent System Operator Corporation, Docket No. EL01-84-000 (Not Consolidated)

Dear Secretary Salas:

Enclosed for electronic filing are the Reply Comments of the California Independent System Operator Corporation and Opposition to Motions to Intervene Out-of-Time submitted in the above-captioned proceedings.

Thank you for your attention in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Reply Comments of the California Independent System Operator Corporation and Oppositions to Motions to Intervene Out-of-Time upon each person designated on the official service lists compiled by the Secretary in the above-captioned proceedings, in accordance with Rule 385.2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California, on this 30th day of August, 2002.

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Margaret A. Rostker